

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

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UNITED STATES OF AMERICA,

Plaintiff-Respondent,

v.

IAN CHRISTOPHERSON,

Defendant-Petitioner.

Case No. 2:09-cr-00056-MMD-VCF
Related Case No. 2:15-cv-00704-MMD

ORDER

This case involves a petition to vacate or set aside a sentence pursuant to 28 U.S.C. § 2255 ("Petition") filed by Petitioner Ian Christopherson. (Dkt. no. 199.) The Court directed the government to respond to the Petition. (Dkt. no. 200.) In response, the government filed a motion to waive the attorney-client privilege between Petitioner and his former counsel and to direct Petitioner's former counsel to provide responsive affidavits ("Motion"). (Dkt. no. 202.) Petitioner opposes the government's Motion. (Dkt. no. 207.)

The government contends that because Petitioner is alleging ineffective assistance of trial counsel, information from Petitioner's former counsel, Randall Roske, is necessary to respond to Defendant's claims. Accordingly, the government requests that the Court find that Petitioner has waived the attorney-client privilege as to Petitioner's communications with Mr. Roske. The government further requests that the Court direct Mr. Roske to "provide affidavits responding to [Petitioner's] allegations." Petitioner does not dispute that a claim of ineffective assistance of counsel may result in

1 a waiver of the attorney-client privilege, but he argues that his allegations of ineffective
2 assistance of counsel are evident in the records before the Court and may be resolved
3 based on those records alone.

4 It is well established that “where a habeas petitioner raises a claim of ineffective
5 assistance of counsel, he waives the attorney-client privilege as to all communications
6 with his allegedly ineffective lawyer.” *Bittaker v. Woodford*, 331 F.3d 715, 716 (9th Cir.
7 2003) (en banc). “The defendant impliedly waives his attorney-client privilege the
8 moment he files a habeas petition alleging ineffective assistance of counsel.” *Lambright*
9 *v. Ryan*, 698 F.3d 808, 818 (9th Cir. 2012) (citing *Bittaker*, 331 F.3d at 716). This rule,
10 which has been identified as “the fairness principle,” ensures that “parties in litigation
11 may not abuse the privilege by asserting claims the opposing party cannot adequately
12 dispute unless it has access to the privileged materials.” *Bittaker*, 331 F.3d at 719. The
13 waiver of the attorney-client privilege, however, is limited to the adjudication of the
14 ineffective assistance of counsel claim in the federal habeas case. See *Bittaker*, 331
15 F.3d at 727-28 (“[D]istrict courts have the obligation, whenever they permit discovery of
16 attorney-client materials as relevant to the defense of ineffective assistance of counsel
17 claims in habeas cases, to ensure that the party given such access does not disclose
18 these materials, except to the extent necessary in the habeas proceeding, i.e., to
19 ensure that such a party's actions do not result in a rupture of the privilege.”)

20 In Ground Six of the Petition, Petitioner raises a claim of ineffective assistance of
21 counsel. (Dkt. no. 199 at 9.) Petitioner recited a list of actions and inactions carried out
22 by former counsel, particularly by Mr. Roske, to support his claim. (Dkt. no. 199-1 at 17-
23 20.) For example, Petitioner alleges that Mr. Roske was not prepared for trial because
24 he had “an investigator do much of the work,” Mr. Roske “did not contact or question
25 witnesses until shortly (less than a week) before trial,” and Mr. Roske did not prepare
26 Petitioner as a witness or discuss the sentencing hearing with him. (*Id.* at 19.) By raising
27 these allegations, Petitioner may very well have waived the attorney-client privilege with
28 respect to communications with Mr. Roske that fall within the scope of these allegations.

1 However, the Court cannot determine the scope of the waiver of the attorney-
2 client privilege because of the broad nature of the government's discovery request. The
3 Court "may, for good cause, authorize a party to conduct discovery under the Federal
4 Rules of Civil Procedure and may limit the extent of discovery." Rule 6(a) of the Rules
5 Governing Section 2254 Cases in the United States District Courts. Discovery requests
6 must be specific. See *id.* Rule 6(b). The government's request for affidavits from Mr.
7 Roske would, in effect, shift the government's obligation to conduct discovery to Mr.
8 Roske by asking the Court to direct Mr. Roske to review Petitioner's allegations and
9 provide affidavits in response. Such a broad request limits the Court's ability to ensure
10 that the waiver of the attorney-client privilege is limited to the adjudication of the
11 ineffective assistance of counsel claim with respect to Mr. Roske in this case.

12 It is therefore ordered that the government's motion to waive attorney-client
13 privilege (dkt. no. 202) is denied.

14 DATED this 11th day of August 2015.



MIRANDA M. DU
UNITED STATES DISTRICT JUDGE